

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION

LONNIE BILLARD,	)	
	)	
Plaintiff,	)	No. 3:17-CV-11
	)	
vs.	)	
	)	
CHARLOTTE CATHOLIC HIGH	)	
SCHOOL, ET AL,	)	
	)	
Defendants.	)	

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TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE MAX O. COGBURN, JR.  
UNITED STATES DISTRICT COURT JUDGE  
SEPTEMBER 16, 2020

APPEARANCES:

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P R O C E E D I N G S

(Due to COVID-19, the courtroom has been reconfigured to allow for social distancing. The proceedings were reported to the best of my ability to hear and understand what was being said from my position in the back of the well behind counsel. Some participants appeared via Zoom. Many participants wore masks.)

(Court called to order 10:00 AM.)

THE COURT: All right. I'll hear from the defendant.

MR. DAVEY: Thank you, Your Honor. Joshua Davey and Moses Tinchler of the Troutman Pepper law firm here on behalf of the defendant in this case, the Roman Catholic Diocese of Charlotte, Charlotte Catholic High School, and Mecklenburg area Catholic schools.

Your Honor, we're here on the diocese's motion for summary judgment and Mr. Billard's motion for partial summary judgment. We're asking the Court to grant the diocese's motion and to deny Mr. Billard's motion.

This case, Your Honor, presents the question of whether a Roman Catholic high school, Charlotte Catholic High School, a school that exists to transmit and teach the Catholic faith to the next generation, can require its teachers to refrain from public conduct in opposition to the religious beliefs of the Catholic church with respect to

1 marriage. And the answer, Your Honor, we submit, is not  
2 difficult and the answer is that Charlotte Catholic can do  
3 that.

4           Your Honor, the free exercise of religion is  
5 literally the first liberty guaranteed in the Bill of Rights.  
6 And time and again, including recent cases, Your Honor, the  
7 Supreme Court and the courts of appeals have emphasized that  
8 Title -- that Title VII of the United States Constitution  
9 ensures the rights of religious organizations to operate  
10 religious schools, including the right to create and maintain  
11 communities comprised of individuals who subscribe to and  
12 practice the faith that Charlotte Catholic seeks to instill in  
13 its students.

14           It's not hard to understand why that's important to  
15 religious organizations like Charlotte Catholic because  
16 Charlotte Catholic is a mission-driven organization not a  
17 money-driven organization. And the mission, Your Honor, is  
18 the message, specifically the Catholic religious message, the  
19 promulgation of the Catholic faith, to the students at  
20 Charlotte Catholic High School. The school uses its teachers  
21 to convey that message. And it's easy to see how that message  
22 is undermined if the school is required under penalty of law  
23 to employ teachers who oppose the message it seeks to convey.

24           Importantly, Your Honor, even in the recent Supreme  
25 Court decisions which have expanded and recognized rights and

1 protections for gay and lesbian Americans, Your Honor, the  
2 Supreme Court at the same time has made it very clear that  
3 religious groups like Charlotte Catholic maintain the right to  
4 create these communities comprised of individuals who  
5 subscribe to the Catholic faith and that they're free to do  
6 that, Your Honor, and that the courts in protecting the rights  
7 of gay and lesbian Americans need to simultaneously protect  
8 the rights of religious groups to teach and promulgate their  
9 faith, Your Honor.

10 We think that Mr. Billard's claims in this case fail  
11 for several reasons which I'll touch on.

12 First of all, we believe that the religious  
13 exemptions to Title VII, Section 702 and Section 703 of the  
14 statute, apply because the reason for the defendant's decision  
15 to release Mr. Billard from his employment was based on their  
16 religious preference for someone who would live in a manner in  
17 accordance with the Catholic faith, Your Honor.

18 Secondly, Your Honor, we don't believe that  
19 Mr. Billard can prove that his sex or his sexual orientation  
20 was a motivating factor in the decision to release him. To  
21 the contrary, Your Honor, the undisputed evidence here shows  
22 that --

23 THE COURT: You're saying his sex or sexual  
24 orientation was not a -- was not a motivating factor.

25 MR. DAVEY: That's right, Your Honor.

1           THE COURT: Are you saying that the announcement  
2 that he was getting married is some kind of advocacy instead  
3 of just a common announcement?

4           MR. DAVEY: Well, Your Honor, if you look at the  
5 Facebook post, what he did is he said, "I intend to marry  
6 Mr. Donham," his partner. And he also said, "If you disagree  
7 with this, keep it to yourself," and, you know, referenced a  
8 song about going to get married. And that, Your Honor, we do  
9 believe is advocacy in favor of a position that is opposed to  
10 what the church teaches about marriage.

11           THE COURT: "If you disagree with this, keep it to  
12 yourself" is an advocacy for -- he's not telling -- he's not  
13 trying to argue with anybody about whether they should agree  
14 or disagree. He's just saying keep it to yourself if you  
15 disagree. But you're saying that's advocacy.

16           MR. DAVEY: Your Honor, that's --

17           THE COURT: Mighty poor advocacy. If you came in  
18 and said, you know, Judge, I just want you to know if you  
19 don't think we should win, that's okay and I'm going to sit  
20 down and let the other side argue, that's not much advocacy,  
21 is it?

22           MR. DAVEY: Your Honor, that's how my client  
23 understood it, as an advocacy for that position.

24           But the facts are Mr. Billard posted on Facebook his  
25 intention to get married. And then as a result of that, he

1 was informed by the assistant principal at Charlotte Catholic  
2 that he would not be able to serve as a substitute teacher.

3 THE COURT: And it's clear that if he'd made an  
4 announcement he was getting married to a woman, that would not  
5 have been a problem for the Charlotte Catholic Church.

6 MR. DAVEY: Your Honor, I disagree. Under the  
7 *Bostock* case in the Supreme Court, the Court kind of gave us  
8 the road map for how you evaluate these things. And what it  
9 said is that the way you know if the decision is based on sex  
10 is if you take Mr. Billard and you make him a woman and ask  
11 what would have happened under those circumstances, Your  
12 Honor. And the evidence is undisputed here that if  
13 Mr. Billard had been a woman and had gone on Facebook and  
14 promoted same sex marriage, then the same result would have  
15 happened.

16 THE COURT: No, that's not my question. My question  
17 is had he said I, a man, am going to marry a woman, that would  
18 have been okay.

19 MR. DAVEY: That's also not quite right, Your Honor.  
20 Because it's not just enough in the Catholic faith for a man  
21 to marry a woman; they have to be free to marry. And I think  
22 if you look at the facts here -- and again, following the  
23 Supreme Court's analysis in *Bostock*, if you make Mr. Billard a  
24 woman and his spouse, Mr. Donham, is a divorced Catholic man  
25 who doesn't have an annulment, then that arrangement, Your

1 Honor, is not something that the Catholic church would  
2 recognize. In fact, there's evidence in the record under  
3 those exact facts, Your Honor, that another teacher was  
4 released from employment for entering into that type of  
5 marriage, again, inconsistent with the Catholic view on  
6 marriage.

7 Your Honor, I'd like to first address the religious  
8 exemptions to Title VII unless the Court has further questions  
9 about that specific point.

10 THE COURT: No, go ahead.

11 MR. DAVEY: Section 702 of Title VII provides that  
12 "this subchapter," those are the words used, "this  
13 subchapter," and that refers to Title VII itself, "shall not  
14 apply to religious employers, including religious schools,  
15 with respect to employment of individuals of a particular  
16 religion who carry on the religious mission of the school.

17 Section 703, Your Honor, of Title VII provides that  
18 it's not a Title VII violation --

19 MR. LARGEES: Your Honor, I hate to interrupt, but  
20 it appears that Zoom has been frozen for a minute or two here.  
21 I don't know if they can hear the argument.

22 THE COURT: Okay. Hold on.

23 MR. LARGEES: Sorry, Josh.

24 MR. DAVEY: Not a problem.

25 THE COURT: Now, I'm seeing his eyes are moving. Is



1 he frozen or is he...

2 MR. LARGEES: My screen has been frozen.

3 THE COURT: Can you hear us?

4 (No response.)

5 THE COURT REPORTER: My screen is frozen.

6 THE COURT: I mean, he looks -- appears to be...

7 THE CLERK: It's working for us, but not for him.

8 MR. LARGEES: Did he respond to you verbally, Your  
9 Honor?

10 THE COURT: Can you hear us?

11 (No response.)

12 THE CLERK: Okay. We're going to have to reconnect.  
13 I don't know what else to do.

14 (Pause.)

15 THE CLERK: It's frozen. Can we take a break to get  
16 IT in here?

17 THE COURT: I guess we have to stop. I hate to  
18 interrupt your train of thought. Let's get IT in here, and  
19 they need to stay in here for the rest of the hearing so we  
20 don't have to stop again.

21 (Pause.)

22 THE COURT: All right. Proceed.

23 MR. DAVEY: Can you all see them? We can't see  
24 them. That's fine, but I just...

25 THE CLERK: You should be able to.

1 MR. DAVEY: Is Your Honor ready?

2 MR. LARGEES: I guess the question is where they got  
3 cut off, Judge. Do we need to establish that?

4 What was the last thing you guys heard?

5 UNIDENTIFIED SPEAKER: The last I heard was the  
6 discussion about if you disagree, keep it to yourself and  
7 whether that constituted advocacy. But we don't need to  
8 repeat parts --

9 THE COURT: Yeah, I think that's -- let's move on.

10 MR. DAVEY: I'll proceed, Your Honor, with the  
11 Title VII --

12 THE COURT: Just proceed where you are and if we  
13 need to --

14 MR. DAVEY: As we were discussing just a moment ago,  
15 Section 702 to Title VII provides that this subchapter,  
16 meaning all of Title VII, does not apply to religious schools  
17 who make an employment decision in preference for someone of a  
18 particular religion.

19 Likewise, Section 703 provides that it's not a Title  
20 VII violation for a religious school like Charlotte Catholic  
21 High School to hire employees of a particular religion where  
22 its curriculum is devoted to advancement of that religion.

23 There's no dispute, Your Honor, that Charlotte  
24 Catholic and the defendants in this case are covered by these  
25 exemptions. They fall within the definition of a religious

1 entity for purposes of the exemption.

2 THE COURT: Can you point to any appellate precedent  
3 holding that sex discrimination is permissible as long as it's  
4 done in the name of religious conviction?

5 MR. DAVEY: Well, Your Honor, there's a number of  
6 cases that we've cited that hold that the religious exemptions  
7 to Title VII apply to sex discrimination claims. And I can  
8 point you to some of these. The *Little versus Wuerl* case from  
9 the Third Circuit, Your Honor, the *Hall* case in the Sixth  
10 Circuit, the *Curay-Cramer* case in the Third Circuit all hold  
11 this way, Your Honor. And I think it's consistent if you read  
12 *Rayburn* and and if you read *Kennedy*, the two Fourth Circuit  
13 cases that address this. They require the same conclusion.  
14 And if you read *Kennedy* it explains Congress's purposes in  
15 enacting these religious exemptions to Title VII, Your Honor.  
16 And I'm going to quote from the decision.

17 "Congress intended to enable religious organizations  
18 to create and maintain communities comprised solely of  
19 individuals faithful to their doctrine of practices whether or  
20 not every individual plays a direct role in the organization's  
21 religious activities." That's the motivation there, Your  
22 Honor.

23 And what those decisions say is that the -- it's not  
24 the case, Your Honor, that these exemptions create a blanket  
25 exception for religious organizations from sex discrimination.

1 That's not what we're saying.

2           The important thing to evaluate, though, Your Honor,  
3 is what is the reason for the employment decision and whether  
4 the reason for the employment decision is motivated by  
5 religious preference. It's not important how the plaintiff  
6 styles the claim. What's important is what is going on behind  
7 the decision.

8           And there's no dispute on these facts, Your Honor,  
9 and Mr. Billard doesn't contest that the defendant's decision  
10 to release him from employment was based on their sincere  
11 religious beliefs in view of the Catholic belief about  
12 marriage, Your Honor. That's not in dispute here. And we  
13 submit, Your Honor, that based on that, and based on the cases  
14 we've cited, that the Title VII exemptions apply.

15           Your Honor, I think there's another reason to read  
16 them that way which is also talked about in *Kennedy* and  
17 *Rayburn*, the Fourth Circuit cases that touch on this, and  
18 that's the principle, Your Honor, of constitutional avoidance.  
19 And of course, that principle dictates that if there's a way  
20 to interpret Title VII that avoids substantial constitutional  
21 questions, then the Court should adopt that interpretation.

22           And so the question here, Mr. Billard contends that  
23 the exceptions only apply if the plaintiff asserts a religious  
24 discrimination claim, Your Honor, and we believe that the  
25 exception can apply where the reason for the employment

1 decision is based on religious preference. And so in deciding  
2 as between the two, if there's a way to avoid a serious  
3 constitutional question, then the Court should adopt that  
4 reading of the exceptions, Your Honor.

5           If Mr. Billard's reading is right, then what Title  
6 VII does is it prohibits Catholic schools from requiring  
7 non-ministerial employees to refrain from conduct with respect  
8 to marriage that violates the Catholic view of marriage, Your  
9 Honor. That type of a prohibition obviously raises  
10 significant constitutional questions. And we've briefed some  
11 of those with respect to the church autonomy doctrine with  
12 respect to RFRA.

13           Your Honor, those are concerns that can be avoided  
14 if the Court adopts the reading of the exceptions to Title VII  
15 that we believe are required by the plain text of the statute.  
16 If Congress had intended to provide that those exceptions  
17 applied only if the plaintiff brings a claim for religious  
18 discrimination, that would have been easy to do. But if you  
19 look at the text of Section 702, it says this subchapter  
20 doesn't apply where the reason for the decision is based on  
21 religious preference, Your Honor. And that's what *Rayburn*  
22 says about those exceptions, that that's what it means.

23           So, Your Honor, we believe that the argument  
24 Mr. Billard is making about this, that it's either a choice  
25 between saying that a religious organization is not subject to

1 any sex discrimination claim or it's saying that the religious  
2 organization is off the hook all together, Your Honor, or that  
3 the religious exceptions only apply if the claim is styled as  
4 one for religious discrimination, Your Honor, that's a false  
5 choice. What the statute, Your Honor, requires and the case  
6 law requires is a middle ground. That the Court has to look  
7 at the reason in a case like this, the reason for the  
8 employment decision. And here it's not disputed that it was  
9 motivated by sincere religious belief, Your Honor. And where  
10 that's the case, Title VII doesn't prohibit a Catholic school  
11 from requiring its teachers, Your Honor, to conduct themselves  
12 publicly in accordance with Catholic teaching.

13           Your Honor, I'm going to move on to the substantive  
14 Title VII argument. We touched on this a moment ago, Your  
15 Honor. That we don't believe that Mr. Billard can prove  
16 there's any evidence to support that either his sex or his  
17 sexual orientation was the motivating factor in Charlotte  
18 Catholic's decision to release him from employment.

19           And *Bostock*, of course, is the most recent work from  
20 the Supreme Court on how the Court is to evaluate this type of  
21 claim. And what the Supreme Court said there in terms of how  
22 the Court can determine if an employment action is taken  
23 because of sex, and I'll quote from the decision, "If the  
24 employer intentionally relies in part on an individual  
25 employee's sex when deciding to discharge the employee, put

1 differently, if changing the employee's sex would have yielded  
2 a different choice by the employer, then a statutory violation  
3 occurred."

4 THE COURT: Let me get this -- I want to get the  
5 factual -- the facts that this is based on. This is based on  
6 this announcement. This wedding announcement is what this is  
7 based on, right?

8 MR. DAVEY: Correct. Yes, Your Honor.

9 THE COURT: No statements or anything inside the  
10 school during teaching. No -- no posts supporting marriage,  
11 gay marriage in general. Just I'm going to get married to  
12 someone and if you disagree, keep it to yourself. I mean,  
13 that's the -- that's the facts that Charlotte Catholic is  
14 basing this on.

15 MR. DAVEY: Your Honor, Mr. -- that's essentially  
16 right. Mr. Billard in October of '14, 2014, posted on  
17 Facebook and he said, "Going to the chapel and we're going to  
18 get married. Going to the chapel and we're going to married.  
19 Yes, I'm finally going to finally make an honest, at least  
20 legal, man out of Rich." That's Mr. Donham, his partner.  
21 "We'll be married on May the 2nd, 2015. Details to follow. I  
22 cannot believe I'm saying this or that it's even possible. I  
23 thank all the courageous people who had more guts than I who  
24 refused to back down and accept anything but equal. PS if you  
25 don't agree with this, keep it to yourself. You never ask my

1 opinion about your personal life and I'm not asking yours."

2 That's what he posted on Facebook. That came to the  
3 attention of the Charlotte Catholic administration. And he  
4 was informed in December that he would not be able to continue  
5 to serve as a substitute teacher. Those are the facts, Your  
6 Honor. I don't think there's any dispute about those facts.

7 THE COURT: A little different than the statement,  
8 "Woman, who is here to condemn you?"

9 "No one, Lord."

10 "And neither do I."

11 MR. DAVEY: Your Honor, with respect to the test  
12 articulated by *Bostock*, I think, as we said, there's no  
13 dispute about the facts. There's no dispute that  
14 Mr. Billard's announcement of his intention to marry  
15 Mr. Donham was a violation of the employment policies that he  
16 agreed to abide by as a teacher at Charlotte Catholic High  
17 School. And there's no dispute, Your Honor, that Charlotte  
18 Catholic had applied those policies in other cases involving  
19 similar conduct, and we've cited some of those examples, Your  
20 Honor.

21 And on these facts, then, following the *Bostock*  
22 test, Your Honor, I think it's undisputed that if Mr. Billard  
23 had been a woman and had gone on Facebook and had thanked  
24 advocates of same sex marriage and said I don't want to hear  
25 your opinion, Your Honor --



1           THE COURT: It said the same thing. You can argue  
2 about whether -- your statement is that he's advocating for it  
3 rather than making an announcement for it. But if there was  
4 a -- if -- I will agree with you, if a woman had gone on and  
5 said I am marrying a woman, I'm sure that Charlotte Catholic  
6 would have taken the same position.

7           The question is whether or not the fact that he was  
8 a man making an announcement that he was marrying a man,  
9 that's the issue that we have here, whether that is  
10 discrimination; whether they've engaged in and violated his  
11 rights with regard to that, not as -- I agree with you. I  
12 don't think there's any question if it was a woman to woman,  
13 it would be the same.

14           MR. DAVEY: Yes, Your Honor. And I think further to  
15 that point, though, if a woman employee, and this is what the  
16 evidence supports, had gone on Facebook and had said something  
17 to the effect of what Mr. Billard said, I am grateful to  
18 advocates who promoted this before me -- that's the import of  
19 his message: Thanking those who had advocated for this cause,  
20 Your Honor. If that had been the message from a female  
21 employee, whether gay or straight, married or not, the  
22 evidence is the result would have been the same, Your Honor.  
23 And that's the *Bostock* test.

24           THE COURT: All right.

25           MR. DAVEY: And I think *Bostock* does not -- what

1 *Bostock* holds, Your Honor, is that it's a Title VII violation  
2 to fire someone merely for being gay or transgender. But  
3 *Bostock* does not proscribe conduct-based rules, and in  
4 particular does not proscribe conduct-based rules based on  
5 sincere religious belief, and that's in the *Bostock* decision  
6 itself, Your Honor.

7           *Bostock* -- going back to the Title VII exemptions,  
8 *Bostock* recognized that those exemptions, while not presented  
9 in that case because it didn't involve a religious employer,  
10 could apply to claims like these involving a Title VII sex  
11 discrimination claim similar to the one Mr. Billard brings.

12           Your Honor, I'd like to next turn to the Religious  
13 Freedom Restoration Act issue. As I've indicated, I don't  
14 believe that Title VII applies to Mr. Billard's claims. But  
15 even if it did, under RFRA, the defendants are entitled to an  
16 exemption. RFRA provides that government shall not  
17 substantially burden a person's exercise of religion even if  
18 the burden results from a rule of general applicability.

19           THE COURT: Does the language of that statute  
20 restrict the statute scope to government action?

21           MR. DAVEY: The statute proscribes action by the  
22 government, Your Honor. And I think there's no dispute that  
23 this Court is part of the government.

24           THE COURT: So you're saying anything by the Court,  
25 then. It's your position that any -- any action by the Court

1 is going to violate RFRA.

2 MR. DAVEY: Well, Your Honor, I don't know if I'd  
3 say any action.

4 THE COURT: That's adverse -- that's adverse to --  
5 in a situation like this is going to violate RFRA.

6 MR. DAVEY: What Mr. Billard is asking the Court to  
7 do is award damages, to reinstate him, and to issue an  
8 injunction. And certainly if the Court were to do that and  
9 prohibit Charlotte Catholic from requiring its teachers to  
10 conduct themselves in a manner consistent with the Catholic  
11 faith, that would be an action by the government and that  
12 would be a substantial burden on the religious exercise of the  
13 defendants, and I don't believe Mr. Billard contests that much  
14 of it, Your Honor.

15 And so the question is what to do under RFRA, Your  
16 Honor. RFRA is a burden-shifting statute, and you can see  
17 this from the Supreme Court's discussion of how the statute  
18 works in *Hobby Lobby*. Once a person has shown the existence  
19 of a substantial burden -- and, Your Honor, we believe the  
20 defendants have done that here -- the burden then shifts to  
21 the government to show that RFRA's least restrictive means  
22 test is satisfied. What that requires is a showing that,  
23 number one, the particular burden, the burden as applied to  
24 Charlotte Catholic High School, is in furtherance of a  
25 compelling governmental interest and it is the least

1 restrictive means of furthering that compelling governmental  
2 interest, Your Honor.

3           And there's no evidence to support the conclusion  
4 that requiring Charlotte Catholic High School on these facts  
5 to employ someone opposed to its religious message furthers a  
6 compelling governmental interest or is the least restrictive  
7 means of doing so. And we know that from *Hobby Lobby*, Your  
8 Honor, where the Court recognized that an exception to a  
9 generally applicable rule -- there, a contraceptive mandate;  
10 here, a Title VII issue if it applies, Your Honor -- does not  
11 seriously undermine the government's interest. In fact, just  
12 as in *Hobby Lobby* where there were exceptions to the mandate  
13 at issue there, Title VII already contains exceptions for  
14 religious organizations from its prohibitions as we discussed,  
15 Your Honor.

16           So just as in *Hobby Lobby*, the appropriate thing  
17 under RFRA was for an exception to be granted to the  
18 particular defendant at issue there. Likewise here, if Title  
19 VII applies to Mr. Billard's claims, then under RFRA the  
20 defendants are entitled to an exception because they've made a  
21 showing. The evidence is undisputed that it's a substantial  
22 burden, Your Honor, and the compelling interest standard  
23 cannot be satisfied on this record.

24           Mr. Billard's real argument isn't that the RFRA  
25 standard doesn't apply -- isn't met, rather. His argument is

1 that RFRA does not apply in lawsuits involving private  
2 parties. He contends it only applies if the government is a  
3 party to the case, Your Honor. But that's wrong for a number  
4 of reasons.

5 First, we know that's wrong because the Supreme  
6 Court in *Bostock* said it was wrong. There again, there was no  
7 religious defendant before the Court, Your Honor, but the  
8 Supreme Court said that in cases like these involving a  
9 private Title VII plaintiff, not the EEOC, that RFRA could  
10 apply.

11 It's also not consistent with RFRA's plain text,  
12 Your Honor, because RFRA proscribes certain government action  
13 that creates a substantial burden on religious exercise.

14 THE COURT: If people are going to come to the  
15 courts to enforce laws, then -- and the courts are the  
16 governmental action, then isn't that just sort of -- just sort  
17 of a get-out-of-jail-free card for any religion to do it? We  
18 can start the religion of what's happening now and have our  
19 own little doctrine and then just do anything we wanted to do  
20 to discriminate and nobody could do anything about it. Sounds  
21 like everybody ought to be at church.

22 MR. DAVEY: Your Honor, I disagree respectfully.  
23 RFRA has a pretty high standard that has to be met and -- to  
24 show a substantial burden and the government has the option to  
25 show a compelling governmental interest. In many cases, of

1 course, it would be able to do that, Your Honor. But here, it  
2 hasn't attempted to carry that burden.

3 And Your Honor, to the extent that RFRA could apply  
4 outside these facts, Your Honor, that's what Congress enacted.  
5 Congress, in fact, wrote into the statute its intentions in  
6 enacting RFRA, which were to restore the compelling interest  
7 test that existed prior to the Supreme Court's decision in  
8 *Employment Division versus Smith* and to provide -- this is  
9 what Congress expressly said in enacting RFRA, "We want to  
10 provide a claim or defense to persons whose religious exercise  
11 is substantially burdened by government," Your Honor. And  
12 that standard is met here.

13 One last point with respect to Mr. Billard's  
14 argument that RFRA only applies in actions involving private  
15 litigants, Your Honor. That, in particular, doesn't make  
16 sense in a Title VII case like this because the EEOC saw  
17 Mr. Billard's charge of discrimination. The EEOC could have  
18 filed this lawsuit itself without Mr. Billard. The EEOC could  
19 have intervened in this lawsuit. Could still do so today if  
20 it wanted, Your Honor. And in fact, Mr. Billard asked for a  
21 right to sue letter and asked the EEOC not to, essentially,  
22 intervene. And now we're here, Your Honor. And it makes no  
23 sense for the substantive protections that RFRA is designed to  
24 convey to turn on whether or not on the same facts, same claim  
25 by Mr. Billard, on whether or not he asked the EEOC to get

1 involved or whether the EEOC chose to get involved.

2           And the Second Circuit, Your Honor, in the *Hankins*  
3 decision recognized this and said that at least with respect  
4 to schemes like Title VII where there's a governmental  
5 enforcer who has the option of getting involved, RFRA clearly  
6 applies to those types of claims.

7           And again, Your Honor, going back to *Bostock*.  
8 *Bostock* says to follow the plain text of the statute, Your  
9 Honor. And if we do that, it's clear that on this record the  
10 defendants have met their burden of showing a substantial  
11 burden on their religious exercise. There's no dispute that  
12 this Court falls within the definition of government in the  
13 statute, Your Honor. The only question is whether the very  
14 high bar set forth in the *Hobby Lobby* decision from the  
15 Supreme Court is satisfied here.

16           And again, that requires that Mr. Billard not simply  
17 articulate that eradication of sex discrimination is a  
18 compelling governmental interest. It is, and we don't dispute  
19 that, Your Honor. But what it requires is that Mr. -- that  
20 the government or Mr. Billard or someone make a showing that  
21 requiring Charlotte Catholic High School, this defendant, to  
22 employ someone who opposes its religious message is the least  
23 restrictive means of accomplishing that goal. And under *Hobby*  
24 *Lobby*, Your Honor, that argument just doesn't work because the  
25 exception is not going to undercut the governmental goal if

1 it's extended to the tiny fraction of religious employers who  
2 seek to uphold the definition of marriage that's consistent  
3 with two millennia of Catholic teaching.

4           Your Honor, finally I'll touch briefly on our First  
5 Amendment arguments. Mr. Billard's claims are also barred by  
6 the First Amendment principles of church autonomy and  
7 associational freedom, Your Honor. And I think the recent  
8 Supreme Court case --

9           THE COURT: If you go to freedom of expression, it's  
10 really -- it really is a cotton loophole. There's nothing --  
11 I mean, if you go with freedom of expression, if you go with  
12 that, then there's -- then you can do anything you want to do  
13 because I'm freely expressing my First Amendment rights;  
14 therefore, I can do what I want to do and move on.

15           MR. DAVEY: Your Honor, the Supreme Court in the *Boy*  
16 *Scouts versus Dale* case said that the freedom to associate  
17 presupposes the right not to associate. And I acknowledge,  
18 Your Honor, that line of reasoning has not been applied on  
19 facts like these, Your Honor. I think it's probably not a  
20 surprise to anyone that this case may go up on appeal, Your  
21 Honor, and we need to preserve those arguments.

22           But Your Honor, I think there's another point to be  
23 made there too. Prior to the *Bostock* decision, it was the  
24 near universal rule of the court of appeals that Title VII did  
25 not recognize a cause of action for sexual orientation-based



1 discrimination. And prior to the Second Circuit's decision  
 2 just a few years ago, no court of appeals had held that Title  
 3 VII extends to claims like this. And as a result of that,  
 4 Your Honor, we now -- and this is -- the *Bostock* court  
 5 recognized this. We're now in a situation where the courts  
 6 have to reconcile the holding of *Bostock* with the principle  
 7 reiterated time and again by the Supreme Court that the courts  
 8 must protect the rights of religious organizations and  
 9 religious schools like Charlotte Catholic to have communities  
 10 centered around (inaudible), Your Honor. So it's not  
 11 shocking, and I don't think anyone should be surprised, that  
 12 there aren't a lot of decisions dealing with some of these  
 13 issues on these specific facts because this is the first wave,  
 14 Your Honor, of cases like this after *Bostock*.

15 But going back to the church autonomy point, Your  
 16 Honor. The Supreme Court recently issued its decision in the  
 17 case *Our Lady of Guadalupe versus Morrissey-Berru*, Your Honor.  
 18 And the Supreme Court talked about this church autonomy  
 19 doctrine and said that it's rooted in a broad principle that  
 20 religious organizations need to be able to operate free from  
 21 governmental interference. And Your Honor, that principle  
 22 dictates a particular application, what's called the  
 23 ministerial exception, but it's not limited to the ministerial  
 24 exception.

25 THE COURT: And you all waived the ministerial.

1           MR. DAVEY: Your Honor, yes. We don't think  
2 Mr. Billard is a minister under the test articulated in the  
3 Supreme Court in *Hosanna-Tabor* a few years ago. We're not  
4 contending he meets that specific --

5           THE COURT: There are a lot of arguments that sound  
6 like you touch on the ministerial. I mean, when you read your  
7 briefs and read their briefs, everybody is kind of talking  
8 like there is an issue on the ministerial exception. If you  
9 read both sides' writings, there's a lot of stuff there that's  
10 kind of telling the courts -- you're arguing the ministerial  
11 exception even though you're not using the ministerial  
12 exception. You're trying to push the -- push that -- because  
13 if you've waived that, you know, that's -- if he's not a  
14 minister, then the question is is he out there advocating  
15 against the religion.

16           MR. DAVEY: Well, I think, Your Honor, the question  
17 is -- again, ministerial exception is one application of this  
18 church autonomy doctrine and that holds that if a person is a  
19 minister -- again, Mr. Billard isn't, but if he was, then he  
20 clearly would not have a Title VII claim, Your Honor.

21           But the question for the Court is whether the -- and  
22 we submit it does, whether that church autonomy principle  
23 extends any further than a minister, Your Honor. And the  
24 Supreme Court has said yes. And Your Honor, I believe what  
25 the Supreme Court has said in its directives to the lower

1 courts is to safeguard the rights of religious organizations  
2 and that they need to be able to create and maintain  
3 communities made up of like-minded individuals, Your Honor.  
4 If they cannot acquire teachers to conduct themselves in a  
5 manner consistent with the faith that they're hired to help  
6 pass on to the next generation, Your Honor, then it's hard to  
7 see -- if that isn't covered by the church autonomy doctrine,  
8 I'm not sure what would be.

9           So that's our argument, Your Honor. We believe that  
10 the Supreme Court's reasoning clearly extends to these facts  
11 even if these precise facts haven't been presented in a case  
12 like this.

13           Your Honor, at the end of the day, Mr. Billard's  
14 argument is that Title VII prohibits Charlotte Catholic High  
15 School from requiring its teachers in their public conduct to  
16 refrain from public opposition to the very message that  
17 Charlotte Catholic seeks to convey. And we submit that that's  
18 not the law, Your Honor. We think that the Supreme Court has  
19 made it very clear and the lower federal courts have made it  
20 clear that religious institutions like Charlotte Catholic have  
21 a right to create and maintain communities, including  
22 teachers, of individuals who agree to conduct themselves in a  
23 manner consistent with the teachings of the church, Your  
24 Honor.

25           And the Title VII exceptions apply here, Your Honor.

1 We don't believe that Mr. Billard can make out his case under  
2 the elements of Title VII. We think RFRA applies and we think  
3 the First Amendment applies.

4           And we also think, Your Honor, that it's clear that  
5 in every recent decision in which the Supreme Court has  
6 extended or recognized protections for gay and lesbian  
7 Americans, it has also recognized the need to simultaneously  
8 preserve the rights of religious organizations. When the  
9 Supreme Court in 2015 in *Obergefell* recognized the right to  
10 same sex marriage, it said at the same time religious  
11 organizations that have a different view have the right to  
12 continue to teach that view and the First Amendment provides  
13 that protection.

14           In *Bostock*, Your Honor, this term, the Supreme Court  
15 said it was deeply concerned with preserving the promise of  
16 the free exercise of religion and that it recognized that even  
17 though *Bostock* didn't involve a religious employer, that the  
18 Title VII exceptions and RFRA and the church autonomy  
19 principles we discussed provide protection to religious  
20 employers on facts like these, Your Honor.

21           So in closing, we would submit that Charlotte  
22 Catholic has the right to teach and practice its Catholic view  
23 of marriage and that necessarily entails the right to require  
24 its teachers to conduct themselves in a manner consistent with  
25 the message that it seeks to convey. And I'll conclude with

1 that unless Your Honor has any further questions.

2 THE COURT: I may in a minute. Let me hear from the  
3 other side.

4 I'm viewing him on television here. I can see  
5 there, but it's clearer here so I'm going to go here.

6 MR. BLOCK: Great. Thank you, Your Honor. Joshua  
7 Block appearing on behalf of plaintiff Lonnie Billard. Thank  
8 you for letting me appear remotely today. I'll just begin by  
9 addressing some of the arguments that we heard today.

10 The facts are clear that Mr. Billard was a beloved  
11 teacher at Charlotte Catholic High School for more than ten  
12 years, but he was fired after he posted on Facebook that he  
13 was marrying his same sex partner Mr. Donham. That's  
14 undisputed and that's simple.

15 Defendants here try to draw a distinction between  
16 the act of becoming engaged and the act of telling someone  
17 you're engaged, but that doesn't make a difference one way or  
18 the other. All that matters is that in order to enforce their  
19 policy against Mr. Billard as an individual, they had to treat  
20 him as an individual differently than they would have treated  
21 a woman who is marrying a man or a woman who was announcing on  
22 Facebook she was marrying a man. No matter how you  
23 characterize it as announcing you're engaged or getting  
24 engaged, the individual sex here is playing an indispensable  
25 but-for cause in the individual's -- in the individual

1 employment decision.

2 THE COURT: Let me ask this question. Did he go too  
3 far when he thanked those who had advocated for the right to  
4 marry who you love?

5 MR. BLOCK: Well, Your Honor, today is the very  
6 first day in the course of this entire case, in the course of  
7 all discovery, all depositions, all briefing that defendants  
8 have ever mentioned those other portions of the Facebook  
9 announcement. If you look at all of their admissions, all of  
10 their responses to the interrogatories, all of the briefs  
11 they've submitted to this Court, that has never once come up.  
12 Over and over again they say that what he did wrong was  
13 announce his intention to marry a same sex partner. So if  
14 from the beginning of the case the defendants made this  
15 argument and preserved it, then we could have responded  
16 through discovery and that would be at issue. I don't think  
17 it's at issue here based on the undisputed record before the  
18 Court. Defendant's counsel can't inject a material question  
19 of fact by bringing it up at the last minute at oral argument.  
20 There's no evidence in the record pointing to those portions  
21 of -- I'm sorry, Your Honor.

22 THE COURT: Has Mr. Billard engaged in any advocacy  
23 supporting same sex marriage?

24 MR. BLOCK: No, Your Honor. The only thing he did  
25 was post this message on Facebook. This isn't an issue where

1 Mr. Billard, you know, campaigns for marriage equality or  
2 posted a political message or even attended a gay pride rally.  
3 All he did was announce that he was getting married to his  
4 same sex partner. And in order to determine that that  
5 announcement constituted advocacy of any kind, it was a  
6 but-for cause that he was a man getting married instead of a  
7 woman getting married.

8 THE COURT: What's the -- what is the evidence that  
9 the reason for firing was sex discrimination rather than  
10 religious?

11 MR. BLOCK: Well, it's uncontested that they had a  
12 religious motivation for discriminating. But the *Bostock*  
13 decision is crystal clear that motivations for discrimination  
14 aren't what matters if they're using sex as a but-for cause of  
15 accomplishing that goal. So in *Bostock* itself the employer  
16 said we're not just discriminating based on sex. We're  
17 discriminating based on sexual orientation and we would apply  
18 that equally to a gay man or a gay woman. And the Court said  
19 that doesn't matter. The motives might be to discriminate  
20 based on sexual orientation, but in order to accomplish that  
21 goal along the way, they had to treat individual employees  
22 differently on the basis of sex.

23 So if they're using an individual's sex as a but-for  
24 cause of the decision in a particular case, their reasons for  
25 doing so don't make any difference. The Court says their

1 motivations, what they call it, what someone else may call it  
2 don't matter. All that matters is that sex is being used as a  
3 but-for cause.

4           And that didn't begin with *Bostock*. That's also  
5 what the Court said in *Johnson Controls*: That whether a  
6 policy facially discriminates on the basis of sex isn't  
7 determined by the motivations of the discriminator, it's  
8 determined by what the policy on its face does. And on its  
9 face a policy saying a man can marry -- can announce they're  
10 marrying another -- a man can announce they're marrying a  
11 woman but cannot announce they're marrying another man  
12 facially discriminates on the basis of sex regardless of the  
13 subjective motivations for having that policy.

14           I do want to object -- I want to address a little  
15 bit more this issue of these other portions of the Facebook  
16 post that they're bringing up now for the first time. They  
17 said the record is undisputed that they've taken similar  
18 actions in other cases. All the other cases they're talking  
19 about are cases where someone actually violated Catholic  
20 teachings about marriage: They got married to a Catholic who  
21 hadn't previously had an annulment; they had an extramarital  
22 affair. They actually haven't introduced any evidence in the  
23 record about other cases where they've punished so-called  
24 advocacy. And in fact, the depositions show that they  
25 admitted they wouldn't fire someone just for advocacy.



1           The individual who fired Mr. Billard testified under  
2 oath that if someone just posted a message on Facebook  
3 supporting same sex marriage, he would have asked them to  
4 speak with the priest; he wouldn't have fired them. And  
5 that's what defendant's declaration by Janice Ritter also  
6 says. They say when someone does something in opposition to  
7 Catholic teaching, we try to see if it can be addressed short  
8 of firing someone. Only if the employee persists in it do we  
9 go to the step of firing.

10           So I don't think all these questions about the  
11 so-called advocacy of the Facebook post are even in front of  
12 this Court. But if they were, the undisputed evidence shows  
13 that it actually would not have triggered a firing. And in  
14 fact, throughout the deposition of the board's 30(b) -- the  
15 school board's -- excuse me, Charlotte Catholic's 30(b) (6)  
16 witness, it was crystal clear that the policy prohibits anyone  
17 from marrying a same sex partner regardless of whether they  
18 talk about it publicly or not, regardless of what type of  
19 employee they are. They can work in a back office, you know,  
20 administering the IT equipment and they cannot say a word to  
21 anyone about their marriage, it still violates their policy.

22           So I think just as a matter of undisputed fact here,  
23 this is a policy against men marrying men or women marrying  
24 women and that's what they applied in this case.

25           If the Court doesn't have any other questions about

1 the sex discrimination issue, I'd be happy to address the  
2 other alleged defenses that defendants raised.

3 THE COURT: Go ahead and do that.

4 MR. BLOCK: So I'll begin with Section 702. The  
5 language of the statute says that this provision does not  
6 apply with respect to employees -- with respect to employment  
7 of individuals of a particular religion. It doesn't say --  
8 that language is very specific in saying the portion of Title  
9 VII that doesn't apply is the portion that prohibits  
10 discrimination against individuals of a particular religion.  
11 And Fourth Circuit precedent is just crystal clear on this  
12 point that all that does is it provides a defense to claims of  
13 religious discrimination. It does not provide any defense to  
14 claims of race, sex, color, or national origin discrimination.

15 Defendants here say you should use the cannon of  
16 constitutional avoidance, but that's exactly what the Fourth  
17 Circuit did in *Rayburn*. *Rayburn* was the first case in which  
18 the Fourth Circuit recognized the ministerial exception. But  
19 before going to that constitutional holding, they said we need  
20 to look closely at 702 to see if there's any statutory way to  
21 avoid this constitutional question. And after their  
22 exhaustive analysis, they said that there wasn't a way to  
23 avoid the question; that they had to reach the constitutional  
24 question because they had no power to carve out an exception  
25 to the statute that Congress (inaudible).

1           And you know, the defendants here would like Rule  
2 702 to mean something else, but we're at the lowest rung of  
3 the federal judiciary right now. We're bound by Fourth  
4 Circuit precedent and the Court doesn't have discretion to  
5 write on a clean slate even if it were inclined to except  
6 defendant's arguments.

7           And saying that there were other cases that somehow  
8 embrace these arguments, defendants are just blatantly  
9 misrepresenting the holdings of those courts. As we explain  
10 in our brief, this is on pages 6 and 7 of our opening  
11 supplemental brief, all of the cases that they're pointing to  
12 are cases in which an employee was fired for a reason that  
13 didn't explicitly discriminate on the basis of sex.

14           In *Little* they were fired for remarrying without  
15 obtaining an annulment. In other cases they were fired for  
16 advocating in favor of abortion rights. The employees in  
17 those cases tried to say that even though they weren't  
18 facially being discriminated against on the basis of sex,  
19 the -- their employer somehow punished their type of advocacy  
20 differently than they would have punished other types of  
21 advocacy, such as, you know, opposition to support for the war  
22 in Iraq or support for the death penalty.

23           And the Court said we're not going to look behind to  
24 see, you know, how the defendants are applying their religious  
25 beliefs to see if they're coming down harder for some

1 religious beliefs than others. That's not the business of the  
2 courts.

3           None of those cases involved a case in which a  
4 policy facially discriminated. And in fact, all of the cases  
5 involving the head of household payments confront the  
6 situation exactly. In the Fourth Circuit, in the Ninth  
7 Circuit, in other courts across the country, there were  
8 schools that said their religious beliefs require that they  
9 pay married men more than married women because of their  
10 religious belief that the man is the head of household and has  
11 to provide. It's a sincere religious belief. But every  
12 single court said that sincere religious belief is facially  
13 discriminating on the basis of sex, and so 702 and 703 don't  
14 apply.

15           The Fourth Circuit's case on this, *Dole versus*  
16 *Shenandoah*, was not a Title VII case. It was a Fair Labor  
17 Standards Act case involving the Equal Pay Act. But the other  
18 cases were all Title VII cases too. And it's crystal clear in  
19 those cases that they're acknowledging that this is  
20 religiously motivated, but they're also saying it's facially  
21 discriminatory so 702 doesn't apply.

22           And the same thing has come up in lower court  
23 decisions where someone gets pregnant using IVF. It's  
24 uncontested that the employers in those cases had a religious  
25 objection to IVF technology; but nevertheless, Title VII

1 explicitly prohibits pregnancy discrimination as part of  
2 discrimination on the basis of sex. And the cases like *Herx*  
3 say this violates Title VII's prohibition on pregnancy  
4 discrimination and 702 doesn't give you a defense regardless  
5 of your religious beliefs.

6           One more thing about constitutional avoidance.  
7 There's no constitutional question in this case to avoid.  
8 Their best argument is under RFRA. But under the Constitution  
9 itself, it's crystal clear that if an employee is not a  
10 ministerial employee, there is no constitutional problem with  
11 requiring a religious employer to abide by the generally  
12 applicable rules of Title VII. There are a bunch of statutory  
13 accommodations such as the (inaudible) exemption in 702, such  
14 as RFRA. But there's not a serious constitutional case to be  
15 had that either the -- either part of the First Amendment  
16 gives a religious employer a constitutional right to  
17 discriminate against non-ministerial employees on the basis of  
18 sex. No court ever has accepted that argument.

19           So they try to get around --

20           THE COURT: Let me ask this question, though. You  
21 have a -- you have a religious school where one of the  
22 doctrines is opposed to gay marriage, gay -- any -- gay, I  
23 guess, anything. And you've got a person who is -- there who  
24 is married to a same sex partner and comes into that school.  
25 Is that not a situation where every day that they come in

1 there's not a problem for the school with regard to that  
2 doctrine since the person that's there is violating that  
3 doctrine?

4 MR. BLOCK: Well, Your Honor, I think that  
5 ultimately there may be a conflict for the school, that the  
6 school may very well experience it as a burden on their  
7 religious exercise if that's how they interpret their  
8 doctrine, but neither RFRA nor the Constitution categorically  
9 prohibits placing a burden on religious exercise.

10 Everyone, including a religious school -- every  
11 employer, including a religious school, is bound by Title VII.  
12 Churches are not above the law. And if there is a  
13 compellingly -- compelling governmental interest that's  
14 narrowly tailored, the government can burn a religious  
15 exercise. RFRA says that explicitly.

16 And so the question here, like in -- this exact same  
17 issue, again, came up in the head of household payments --  
18 this is in the Fourth Circuit -- where the school said we have  
19 a sincere religious belief that we can't pay married women as  
20 much as married men. You're forcing us to act inconsistently  
21 with our religious beliefs. And the Fourth Circuit said  
22 (inaudible) in their religious beliefs, but nevertheless  
23 protecting sex discrimination in employment of non-ministerial  
24 employees is an interest of the highest order and that  
25 prohibiting that discrimination is the most narrowly tailored

1 way of achieving it.

2           So, you know, in our society there may come  
3 instances in which rights to equality and rights to religious  
4 freedom are in tension and we have many, many, many  
5 protections for Charlotte Catholic and other religious schools  
6 when that happens. They can fire a ministerial employee for  
7 whatever reason they want. Title VII doesn't apply at all.  
8 And under the Supreme Court cases, many teachers qualify as  
9 ministerial employees if they're actually teaching religion.

10           That's not what happened here. Mr. Billard was  
11 actively told he shouldn't say anything about religion. Leave  
12 that to the religious teachers. And of course, they've  
13 stipulated that the ministerial exception doesn't (Zoom  
14 froze).

15           THE COURT: Okay. It's just frozen.

16           MR. LARGEES: Yes.

17           THE COURT: Chris, it just froze on us.

18           MR. LARGEES: Ms. Como is still active, but...

19           There we go. He doesn't realize he froze. I think  
20 you're going to need to tell him.

21           MR. BLOCK: Oh, I froze?

22           MR. LARGEES: Yeah, you froze for a while, Josh.

23           MR. BLOCK: Oh, that's too bad. I said something  
24 really, really compelling during that time.

25           What's the last thing you heard?

1           THE COURT: You were talking about -- you weren't  
2 off for long. I heard most of what your argument was. You  
3 were off probably -- probably for a minute.

4           MR. BLOCK: All right. So I was just saying that on  
5 top of the ministerial exception, 702 gives them the right to  
6 dictate their religious beliefs to their employees in a way  
7 that no private for-profit company could. This is extremely  
8 strong authority to discriminate based on religious beliefs.  
9 It's just not unlimited. They can do it as long as they're  
10 not using those religious beliefs in a way that requires  
11 discrimination based on race, sex, color, or national origin.

12           So we're talking about huge amounts of accommodation  
13 for religious exercise here, but that doesn't mean that the  
14 religious school always wins. When it comes to interest of  
15 the highest order, which is protecting employees who are paid  
16 for salary from employment discrimination on the basis of sex  
17 or race or, for that matter, sexual orientation, those are  
18 compelling governmental interests and compelling governmental  
19 interests are allowed to outweigh religious exercise if  
20 they're narrowly tailored.

21           Their argument about RFRA is that even assuming that  
22 RFRA were to apply here, their argument is, well, it might be  
23 compelling to prohibit other employers from discriminating,  
24 but it's not compelling to prohibit us from discriminating.  
25 And again, the Fourth Circuit rejected that argument in



1 *Rayburn* and *Dole*. *Dole* was a religious school and they said  
2 it's still a compelling interest of the highest order.

3 But the real problem with their argument is in *Hobby*  
4 *Lobby*, the reason why it was possible to grant an exception  
5 was because the effect of granting an exception would have a  
6 negative impact on the individual employees of precisely zero.  
7 You could give an exception to *Hobby Lobby* and the employees  
8 would still get their insurance for birth control. It had  
9 zero negative impact on them. That's why it wasn't narrowly  
10 tailored and an exception was available.

11 They say, well, this situation is similar because of  
12 all the people in the world who are protected by -- from sex  
13 discrimination, we're just allowing religious schools to  
14 discriminate. But that's not how it works. The government  
15 has a compelling interest in protecting Mr. Billard as an  
16 individual, as an individual human being, from discrimination  
17 on the basis of sex in employment. That is a compelling  
18 interest. And the only way to protect him as an individual is  
19 to prohibit employers from discriminating against him on the  
20 basis of sex. That's exactly what the Sixth Circuit said in  
21 *Harris Funeral Home*.

22 Which brings me back to one more point about RFRA.  
23 It's not true that the -- all the plaintiffs in RFRA, you  
24 know, were just involved in private litigation without the  
25 government. The name of the *Harris Funeral Home* case was *EEOC*

1 *versus Harris Funeral Homes*. It was brought by the EEOC and  
2 for that reason Harris Funeral Homes was allowed to raise a  
3 RFRA defense in the Sixth Circuit. Then when the solicitor  
4 general's office prohibited the EEOC from defending its  
5 judgment on appeal, private counsel for Ms. Stevens came and  
6 intervened. But the reason why RFRA was absolutely in that  
7 case is because EEOC was a party.

8           So when the Supreme Court is talking about RFRA, and  
9 actually explicitly mentions that the Sixth Circuit rejected a  
10 RFRA defense in *Harris Funeral Homes*, but that was an appeal  
11 for cert. The government was absolutely a party in that case.

12           THE COURT: All right. Let's move on.

13           MR. BLOCK: Yeah. Actually, I think I've covered  
14 almost everything. There's the church autonomy argument.  
15 Again, I think that's, you know, very much covered by our  
16 briefs. The only cases they point to in which some other  
17 ecclesiastical autonomy applied was very unusual circumstances  
18 in which a ministerial employee couldn't challenge their  
19 firing so they said that their employer's speech, their  
20 antigay speech somehow constituted sexual harassment. And the  
21 courts that they cite said no, no, no, no, you know, you're  
22 really just challenging the church's doctrine there. You  
23 know, the speech is protected. None of those cases involved  
24 firing someone.

25           The footnote I'd make to that is actually the two

1 district court cases they cite from the Seventh Circuit have  
2 now actually been abrogated on appeal. The Seventh Circuit  
3 just recently held that, in fact, the ministerial exception  
4 and church autonomy don't bar sexual harassment claims. I  
5 think that whether or not that decision is correct is neither  
6 here or there because it doesn't apply to our case. But I  
7 would just note that, you know, right now those district court  
8 decisions aren't even good law in the Seventh Circuit.

9           And then as for *Dale*, you know, again, this is yet  
10 another unprecedented argument that hasn't been accepted by  
11 any court. *Dale* was a public accommodations case involving a  
12 volunteer scout leader. It was about an organization's  
13 ability to choose its own members. Mr. Billard isn't applying  
14 to be a member of the church. He is an employee who receives  
15 salary for the work he performs. That is a commercial  
16 transaction. It's commercial association. And the fact that  
17 it has religious meaning to defendants doesn't change the fact  
18 that it is subject to Title VII as a commercial transaction.

19           THE COURT: All right.

20           MR. BLOCK: I guess that's all I have, Your Honor.

21           THE COURT: All right. Let me hear a quick brief  
22 response from the defense.

23           MR. DAVEY: Very briefly, Your Honor.

24           We've long contended Mr. Billard's Facebook post  
25 about advocacy, so I'm not sure exactly where this waiver

1 concept is coming from. That's been our position for a long  
2 time.

3           Your Honor, I just disagree with Mr. Block about his  
4 argument about Section 702. I think the plain text there says  
5 this subchapter, that's Title VII, doesn't apply. And it goes  
6 to what is the reason for the employment decision, Your Honor.  
7 And there's just no dispute that the decision here of the  
8 defendants was motivated by their sincere religious belief  
9 which is something that is constitutionally protected, Your  
10 Honor. And the Supreme Court has reiterated time and again  
11 courts should protect, even in cases like this that involve  
12 rights of gay and lesbian individuals as well.

13           Your Honor, Mr. Block spent a lot of time talking  
14 about the government's interest in eradicating sex  
15 discrimination. Again, we don't have a disagreement with that  
16 as a general matter. But what *Hobby Lobby* says, Your Honor,  
17 is that the government -- to carry its RFRA burden in this  
18 case, the government must show it has a compelling interest in  
19 requiring Charlotte Catholic High School to employ individuals  
20 who oppose its religious message, Your Honor, and that showing  
21 just can't be made here. And we don't think that interest  
22 exists, and you can tell that, Your Honor, because Title VII  
23 itself contains exceptions. RFRA is out there to protect  
24 religious organizations. And there's the First Amendment,  
25 Your Honor, and you have to balance those in weighing what is

1 the governmental interest at issue.

2           Your Honor, in closing, Charlotte Catholic is not  
3 just some commercial defendant the way that Mr. Billard would  
4 like to portray them -- Mr. Billard's counsel would like to  
5 portray them. They're a religious school that exists to  
6 transmit a good message.

7           THE COURT: Yeah, they're a good school.

8           MR. DAVEY: And Mr. Billard knew what he was signing  
9 up for when he came to teach at Charlotte Catholic for ten  
10 years. There's no dispute that he was a well liked teacher,  
11 Your Honor. But at the end of the day, Your Honor, Charlotte  
12 Catholic has a right to, again, create and maintain a  
13 community of individuals who are willing to live by Catholic  
14 teaching and has the right to not employ those folks if they  
15 decide, as Mr. Billard had a right to do, not to live in that  
16 manner.

17           And so for all those reasons, Your Honor, we would  
18 ask the Court to grant the diocese's summary judgment motion.

19           THE COURT: All right. Thank you all very much, and  
20 we will let you know where we go. This matter is concluded  
21 for today.

22           MR. DAVEY: Thank you, Your Honor.

23           MR. BLOCK: Thank you, Your Honor.

24           THE COURT: Normally I would come down and shake  
25 your hands, but...

1           MR. DAVEY: Under the circumstances we can't do  
2 that.

3           THE COURT: Under the circumstances I'm staying away  
4 and you probably are glad I'm staying away.

5           (End of proceedings at 11:01 AM.)

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1 UNITED STATES DISTRICT COURT  
2 WESTERN DISTRICT OF NORTH CAROLINA  
3 CERTIFICATE OF REPORTER  
4  
5

6 I, Cheryl A. Nuccio, Federal Official Realtime Court  
7 Reporter, in and for the United States District Court for the  
8 Western District of North Carolina, do hereby certify that  
9 pursuant to Section 753, Title 28, United States Code, that  
10 the foregoing is a true and correct transcript of the  
11 stenographically reported proceedings held in the  
12 above-entitled matter and that the transcript page format is  
13 in conformance with the regulations of the Judicial Conference  
14 of the United States.

15  
16 Dated this 13th day of July 2022.  
17  
18

19 s/Cheryl A. Nuccio

20 Cheryl A. Nuccio, RMR-CRR  
21 Official Court Reporter  
22  
23  
24  
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